sufficient evidence on oath before the trial judge on which he could be satisfied either by inference or otherwise that the appellant had sold the properties on August 10, with intent to obstruct or delay the execution of any judgment which might be made against him. In our view, the fact that the appellant had been convicted by the High Court in Kuala Lumpur together with the first and third defendants on criminal charges from the transactions which are among the subject matter of these proceedings and an appeal against conviction was then pending in the Federal Court, does not help the respondents to prove the necessary intention of the appellant in view of the nature of the sale transaction. As correctly stated by deponent Ibrahim in paragraph 5 of his affidavit, the result of the criminal case would not directly affect the present civil proceedings. Although in subsequent affidavit of Ibrahim sworn on January 17, 1978 it was disclosed that appellant had also disposed of property No. (1), viz, his residence at No. 34A Jalan Tengku Ampuan, the transfer of the matrimonial home was in fact to his own wife in respect of a quarter share and the remaining three-quarter share to her as trustee, the consideration being natural love and affection. It was transferred on April 17, 1976 whilst the criminal prosecution was pending against the appellant, and it was about a year and three months before the writ in Civil Suit No. 2110/1977 was filed. But this 1976 transfer, which could have been discovered from the Land Office Registry, was not disclosed to the learned judge when the *ex parte* order was made, and as such he could not have exercised his discretion in matters unknown to him. Having considered the decision of *Munns* v. *Longden*,[3] we are satisfied that in the circumstances of this case fresh evidence should not be introduced at the hearing of an application to set aside the *ex-parte* order made in chambers.

Accordingly, we allow this appeal, and set aside all the *ex-parte* orders made on November 16, 1977. The order requiring the appellant to declare all his assets and the order of injunction are clearly outside the scope of the Debtors Ordinance. The respondents must pay the costs.

Application dismissed.

Solicitors: *Zaitoon Othman & Associates.*

ZAINAL ABIDIN BIN HAJI ABDUL RAHMAN v. CENTURY HOTEL SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman F.J. & Mohamed Azmi J.) November 5, 1981 & January 22, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 189 of 1981]

Practice and Procedure — Interlocutory injunction in advance of judgment — Mareva injunction — Whether court in Malaysia has jurisdiction to issue — Whether injunction should be issued — No evidence of danger that assets of defendant would be dissipated — Courts of Judicature Act, 1964 Schedule, para. 6.

This was an appeal from the decision of Hashim Yeop A. Sani J. reported in [1982] 1 M.L.J. 40. The respondent had let the third floor of a nine-storey building belonging to them to the appellant for purposes of running a recreation centre. The respondent subsequently decided to close the hotel business run by them and they informed the appellant that there would no longer be guests of the hotel requiring the services provided by the appellant. The appellant issued a writ claiming wrongful repudiation of the contract and damages. The appellant then filed a notice of motion to restrain the respondent from selling, transferring or in any manner whatsoever disposing of the land and building until the hearing and disposal of the suit or until further order. He claimed that if the land and building were sold he would be deprived of the fruits of any judgment he might obtain against the respondent. Hashim Yeop A. Sani J. dismissed the application as he held *inter alia* that the relief sought by the appellant was unknown in our law as there was no equivalent to section 45 of the English Court of Judicature (Consolidation) Act, 1925. He also held that the appellant had not disclosed sufficient grounds to justify any intervention by the court.

Held: (1) the High Court in Malaysia has jurisdiction to grant a *Mareva* injunction in appropriate circumstances, as the provisions of paragraph 6 of the Schedule to the Courts of Judicature Act, 1964, are the equivalent of the provisions of section 45 of the English Court of Judicature (Consolidation) Act, 1925;

(2) in this case although the appellant has raised a serious question to be tried on the question of the damage he has suffered by reason of the alleged wrongful repudiation of the lease agreement, there was no evidence to show that there was a danger that the available assets of the respondent would be dissipated to prejudice the appellant's claim;

(3) in the circumstances it would not be proper to make the order sought by the appellant against the respondent.

Cases referred to:-

(1) *Nippon Yusen Kaisha* v. *Karageorgis & Anor.* [1975] 3 All E.R. 282.

(2) *A.J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565.

(3) *Allen* v. *Jambo Holdings Ltd. & Ors.* [1980] 2 All E.R. 502.

(4) *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190.

(5) *Cretanor Maritime Co. Ltd.* v. *Irish Maritime Management Ltd.* [1978] 1 Lloyd's Rep. 425.

(6) *Third Chandris Shipping Corporation & Ors.* v. *Uni-Marine SA* [1979] 2 All E.R. 972, 985-986.

(7) *Mareva Compania Naviera S.A.* v. *International Bulk Carriers S.A.* [1980] 1 All E.R. 213; [1975] 2 Lloyd's Rep. 509.

(8) *Hunt* v. *BP Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104.

(9) *Yeng Hing Enterprise Sdn. Bhd.* v. *Liow Su Fah* [1979] 2 M.L.J. 240, 244.

FEDERAL COURT.

Sri Ram for the appellant.

Raja Abdul Aziz Addruse for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): On September 6, 1980 the respondent company ("the company"), the registered proprietor of a nine-storey building in Jalan Syed Putra, Kuala Lumpur, let to the appellant the third floor for purposes of running a recreation centre for a term of three years commencing November 1, 1980 at a monthly rental of $12,000 payable in advance together with a further charge of $2,000 per month for electricity and water rates. There is a provision for renewal at the end of the term. The demised premises forms part of the said building where the company is operating a hotel business under the name of Abad Century Hotel. The recreation centre is one of the amenities provided in the hotel. The appellant commenced business on November 1, 1980. Because the hotel business was running at a loss the company decided to close the hotel business. That decision was widely reported in the national newspapers. On August 10, 1981 it sent a letter to the appellant informing him of the formal closure of the hotel with effect from August 30, 1981 and of the fact that there would no longer be any guests of the hotel requiring the services provided by the appellant in the demised premises. The appellant felt aggrieved and issued a writ on August 26, 1981 claiming wrongful repudiation of the written agreement and damages in the sum of $5,000,000. The company filed their statement of defence and counterclaim alleging breach of the provisions of the written agreement viz. failing to pay the rent in time, arrears of rent and parting with the actual possession and or use of the demised premises to one Tai Woon Oon and failing to obtain a valid licence to carry on the recreation centre. The appellant filed a reply and defence to the counterclaim on September 16, 1981.

On September 4, 1981 the appellant filed a notice of motion to restrain the company from selling, transferring or in any manner whatsoever disposing the said land and the said building thereon until the hearing and disposal of the suit or until further order. He filed an affidavit stating that he has carried out extensive renovations amounting to approximately $108,136.25, that the company was in breach of the terms, contents and covenants contained in the said agreement and that the land and the said building are the only substantial assets owned by the company, that the said land has been charged to Bank Bumiputra Malaysia Berhad for a principal sum of $2.4 million, that they have caused to be declared in at least two newspapers their intentions to close down the hotel business making admissions of losses of about $500,000 per annum from 1974 to 1980 and that he believed that the company intends to dispose of the said land and building. He therefore contends that in the event of such a sale there is a serious probability or a real likelihood that the surplus moneys, if any, would be appropriated by Paremba Berhad, the holding company of the company, leaving the appellant to resort to a worthless shell and thereby deprive him of the fruits of any judgment that he may obtain against the company. He therefore says that there is a grave danger that any final judgment that he may obtain would be rendered futile and ineffective if the company is left free to dispose of the said land and building. There was the usual undertaking as to damages.

The company filed an affidavit in reply stating that as a result of their intention to close the hotel business there would therefore no longer be any guests of the hotel requiring the services provided by the appellant in the demised premises. They contend that the letter of August 10, 1981 does not constitute a notice to quit and cannot be considered as evincing an intention to terminate the agreement or to repudiate it. They further say that the appellant is not entitled to the injunction since the building does not form the subject matter of the action and as such the need to preserve the building pending the disposal of the said action does not arise. On the balance of convenience they say that the hardship which they will suffer if the injunction is granted and the proposed sale prevented will be far greater than that which the appellant will suffer. Further they say that the appellant's claim, if any, is one which can be adequately compensated in damages and the fact that the company is a subsidiary company of Paremba Berhad cannot give rise to the inference being drawn by the appellant.

The application raised in the High Court consideration of the principle governing a Mareva injunction. At present the sea is an unchartered one, as no similar case has ever been brought in this country. The learned judge considered what in essence is a Mareva injunction and after considering the English cases beginning with *Nippon Yusen Kaisha* v. *Karageorgis & Anor.*[1] and ending with *A.J. Bekhor & Co., Ltd.* v. *Bilton*[2] and also section 25 of the Courts of Judicature Act, 1964 and paragraph 6 of the Schedule to the said Act and sections 50 and 51 of the Specific Relief Act, 1950, he came to the conclusion that the High Court in this country possesses no power to grant restraining orders of the nature described as a Mareva injunction. He said that there is no equivalent provision corresponding to section 45 of the English Supreme Court of Judicature (Consolidation) Act 1925. He dismissed the application on the following grounds:

(a) The relief sought by the plaintiff in the notice of motion is unknown in our law;

(b) The only remedy available to the plaintiff before judgment according to our law is provided by section 19 of the Debtors Ordinance (now Act) 1957 upon satisfying the court of the requirements of that section;

(c) The types of restraining orders that can be granted by the High Court here are restricted to those described in the Specific Relief Act 1950 and paragraph 6 of the Schedule to the Courts of Judicature Act 1964; and

(d) The affidavit of the plaintiff does not disclose sufficient grounds to justify any intervention by the court.

The Mareva injunction is an established feature of English law. The English courts have provided guidelines in the scope, logistics and machinery of the Mareva injunction. It is a copy book example of the consequences of judicial intervention by way of a new doctrine. It is an injunction granted *ex parte* against

a defendant in a pending action to restrain him from removing assets from and now even dissipating them within the jurisdiction and so stultifying any judgment in favour of the plaintiff. It has been steadily widened so that it is now available in a personal injury claim (see *Allen* v. *Jambo Holdings Ltd. & Ors.*[3]) and where the defendant is not a foreigner or foreign based (see *Barclay-Johnson* v. *Yuill*[4]). Although the extensions were perhaps inevitable the judges have indicated that the jurisdiction must not be stretched too far lest it be endangered. It must not be debased into something invoked to obtain security for a judgment in advance, or pressuring a defendant into a settlement. "The courts must be vigilant to ensure that a Mareva defendant is not treated like a judgment debtor" (see *A.J. Bekhor & Co. Ltd.* v. *Bilton* (*supra* — [1981] 2 All E.R. 577)). It is consequently not accurate to refer to a Mareva injunction as a pre-trial attachment (see *Cretanor Maritime Co. Ltd.* v. *Irish Maritime Management Ltd.*[5]).

We are very much impressed with the facts of the reported Mareva cases which indicate that the jurisdiction is wholesome; that it is fulfilling a modern commercial need. The English courts had to approach modern problems with the flexibility of modern business. Whilst in former days it was difficult for defaulting debtors to transfer assets out of the jurisdiction to stultify a judgment, today, vast sums of money can be transferred out of the country in a matter of seconds as a result of a few words spoken by telephone or by sending a telex message. Perhaps the best description of the court's rationale is found in Lawton L.J.'s judgment in *Third Chandris Shipping Corporation & Ors.* v. *Unimarine S.A.*[6] which we reproduce *in extenso*:

> Before the coming of the electric telegraph, the railways and steamships, foreign debtors who wished to flee the realm and take their assets with them in order to avoid paying their just debts must have found doing so far from easy. Travel overland was slow and once the coast was reached there might be long waits because of the vagaries of wind. Even so, local courts in commercial centres such as the City of London, Bristol, Exeter and Lancaster exercised a special jurisdiction over foreign merchants who had left the realm and were sued for debt. Any goods they had left behind could be seized: see *Pulling* on the Laws, Customs and Regulations of the City and Port of London. Other jurisdictions outside England and Wales exercised the same kind of powers. Many still do; and for the owners of ships one of the most important is New York since many time charters are made on the form of charterparty approved by the New York Produce Exchange. Those relating to the Genie and the Pythia were made on such forms, save that arbitration in London was substituted for New York.
>
> Nowadays defaulting on debts has been made easier for the foreign debtor by the use of corporations, many of which hide the identities of those who control them, and of so-called flags of convenience, together with the development of world-wide banking and swift communications. By a few words spoken into a radio telephone or tapped out on a telex machine bank balances can be transferred from one country to another and within seconds can come to rest in a bank which is untraceable or, even if known, such balances cannot be reached by any effective legal process.
>
> Honest commercial men operating on the world's exchanges have to learn to spot those who are likely to be defaulters. They have no difficulty in doing so when there is a known record of default. If they trade with such a defaulter, any losses they sustain are the result of their own foolishness. The difficult cases are firstly and most commonly those which arise when the other party to a contract meets unexpected trouble for himself after he has entered into it, such as when there is a fall in the market, and, secondly, when there is something akin to a long term fraud by the build-up of confidence to be followed by default. The experienced operators often sense what is likely to happen. There may be rumours around the exchange. When there are, the mischievous and malicious have to be separated from the well-founded. There may be tardiness in settling accounts or a change in the trading pattern, or even in a life style. It is considerations such as these which cause businessmen to issue writs rather than wait for payment. Sensible commercial men do not issue writs merely because a dispute has arisen with someone, whether he be British or a foreigner, who is known to be good for the debt and who is likely to meet his obligations if any dispute is decided against him.
>
> Once a writ is issued, a debtor who intends to default will do what he can to avoid having to meet his obligations. The British defaulter may try to dissipate his assets; he may succeed to some extent but retribution in the form of either bankruptcy or liquidation will probably come about one day. Until recently the prospects for the defaulting foreigner were much better. A telephone call or telex message could within seconds of the service of a writ, or knowledge that a writ had been issued, put all liquid assets out of the reach of the creditor. It was these considerations which led this court to exercise the jurisdiction given by section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 to issue *ex parte* injunctions whenever it was just or convenient so to do, the cause of action itself being triable within the jurisdiction."

This court has not previously had to decide the matter. It would be of no value for us to attempt at yet another judgment containing a discussion of this field of law, or to embark on a written analysis of the various aspects of opinion and of modes of expression in the judgments of the English courts. Instead, profiting from the guidance to be obtained from the judicial discussions in England, we can state some general conclusions applicable to the law of Malaysia. It is established that the English court's jurisdiction to grant a Mareva injunction was based on the old procedure of 'foreign attachment' where it was used to compel the defendant to appear and give bail to attend. If he were outside the jurisdiction, the plaintiff was entitled instantly, after issuing the writ, to attach the defendant's assets within the jurisdiction. The interlocutory injunction is the modern version of the old established procedure. The courts invoked section 25(8) of the Supreme Court of Judicature Act, 1973 when granting the injunction. The subsection reads:

> "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory Order of the court in all cases in which it shall appear to the court to be just or convenient...."

That subsection was repeated in nearly the same words in section 45 of the Supreme Court of Judicature (Consolidation) Act 1925. It reads:

> "(1) The High Court may grant a *mandamus* or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do...."

This section enables the court a wider discretion to grant an interlocutory injunction wherever it appears to the court to be just or convenient. The Mareva injunction is now given statutory force by section 37(2) of the Supreme Court Act, 1981.

This discretion exercised by the courts is not fettered by rigid rules. The first two cases on Mareva injunction, viz., *Nippon Yusen Kaisha* v. *Karageorgis & Anor, supra,* and the *Mareva Compania Naviera S.A.* v. *International Bulk Carriers S.A.*[7] itself are

part of the evolutionary process enabling the law to deal with the commercial realities of modern business. It is illustrative of a statutory provision conferring judicial discretion to do what is just and convenient being applied in a way which keeps them in line with contemporary changing social attitudes.

Paragraph 6 of the Schedule to the Courts of Judicature Act, 1964 would appear to be the equipollent provision to section 45 of the English Supreme Court of Judicature (Consolidation) Act, 1925 and reads:

"6. Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever."

Counsel on both sides however stand on common ground in submitting to us that this provision is not applicable in view of the fact that it provides for the interim preservation of property the subject-matter of any cause or matter and the subject-matter of the present action is only a claim for damages for wrongful repudiation of the lease agreement and not the land and hotel building to which the appellant's motion relates, without however making any reference whatsoever to the definition of 'cause' and 'matter' in the Act.

The short answer to the question raised as to the applicability of the provisions of paragraph 6 of the Schedule to the Act is twofold. First, section 3 of the Act defines 'cause' to include any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding. The word 'includes' enlarges the scope and meaning of the term 'cause', and 'cause' as defined includes *inter alia* any 'action' which itself is defined in that section to mean a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court but does not include a criminal proceeding. 'Matter' is defined in section 3 to include every proceeding in court not in a cause. The subject-matter of the motion for injunction could conceivably in the circumstances come within the ambit of the definition of 'cause' as defined in section 3 but in any event it would certainly be for the purposes of paragraph 6 of the Schedule the subject-matter of a 'matter' within the definition thereof in section 3 of the Act. 'Matter' is defined to 'include' and not 'mean' and must therefore *ex necessitate* connote as well every proceeding in court in a cause, and 'proceeding' itself is defined in the interpretative provision to mean any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding. Second, although the appellant's claim is for damages for wrongful repudiation of the lease agreement entered into, it necessarily relates to the lease of the third floor of the premises in question, and in essence therefore the land and building involved would be the subject-matter of the application for an injunction for the purposes of the interim preservation of property within the provisions of paragraph 6 of the Schedule to the Act.

We hold therefore that the provisions of paragraph 6 of Schedule to the Act are pertinent and do indeed apply and we are of the view that the same considerations are applicable as in the case of the English statutory provision of 1925. We have accordingly come to the conclusion that contrary to the learned judge's view the High Court has jurisdiction to grant a Mareva injunction in appropriate circumstances.

In this country we encourage greater foreign participation and investment in development projects. In such a situation where foreign businessmen including foreign multinational corporations have injected large sums of money and have substantial assets in this country, it would be a potential vehicle of injustice if the plaintiff is denied the facilities afforded by a Mareva injunction against the foreign defaulter who may try to dissipate his funds and assets in this country. It is significant that in other jurisdictions the Mareva principle has been adopted. The existence of the Mareva jurisdiction has been affirmed in New Zealand and Australia, except New South Wales (see *Hunt* v. *BP Exploration Company (Libya) Ltd.*[3]). In Singapore, the existence of the jurisdiction has been acknowledged, although there is as yet no judicial pronouncement upon it (see [1981] 2 M.L.J. cvii). We have a good deal of commercial activity involving foreign parties and the application of the Mareva doctrine is likely to play an important role. It is an extremely useful addition to the judicial armoury and is clearly capable of general application.

The conclusion just arrived at makes it unnecessary to consider the sustained argument addressed to us by counsel for the company that paragraph 9 of the Courts (Amendment) Ordinance, 1951 applies to give jurisdiction to the High Court to grant the injunction, but out of deference to the careful argument by counsel on the point, we should make some brief observations on that aspect of the case. At the risk of prolixity we reproduce the paragraph:

"9.(1) A court may commit to prison for such period, not exceeding six months, and in such manner as may be prescribed by rules of practice and procedure, any person who wilfully disobeys or fails to comply with any order of the court, or who, with a view to defeating the ends of justice or preventing or delaying the satisfaction of a judgment or order passed, or which may be passed, against him, flees or attempts to flee the jurisdiction, or disposes or attempts to dispose of any property, or evades or attempt to evade the service on him of any process of the court."

Counsel has focused on the words "with a view to defeating the ends of justice" and has interpreted them to mean that they embody injunctive relief which give the High Court jurisdiction to grant the injunction. The argument merits no consideration as the short answer is that paragraph 9 only empowers the court to commit a person to prison in the circumstances therein provided, and no question of any injunctive relief or other restraining order against the disposal of property as such is provided for therein.

The question pertinent to the instant matter then is: has the appellant established the damage he claims that any available assets will be dissipated so as to frustrate eventual satisfaction of the judgment?

We are satisfied that he has raised a serious question to be tried on the question of the damage he has suffered by reason of the alleged wrongful repudiation of the lease agreement. Although his claim would

appear to be somewhat inflated it would be a matter of evidence for him to establish and if there is a serious question to be tried and the necessary criteria met, the court can protect him by way of the interlocutory injunction in advance of judgment.

The appellant still has to establish the second requirement, that is in order to gain the particular form of protection sought by the injunction he must show that there is a danger that the company's available assets will be dissipated to prejudice the appellant's claim. That is a matter of evidence. Our appreciation of the factual material before us leads us to the conclusion that the appellant really shows very little reason for thinking that the company cannot satisfy the judgment if it were unsuccessful. On the other hand, that is a matter which lies within the knowledge of the company and it has not made full disclosure of its affairs. The defendant in a suit or matter is not called upon to prove its solvency the moment it becomes a defendant and proceedings of this kind are not a means by the use of which it can be called upon to do so. We also take the view that there is no evidence of any intention on the part of the company to remove its assets out of reach of the appellant and we do not think any such evidence can be spelled out in such a way as to make it significant from the fact that the company is a subsidiary of Paremba Berhad. Moreover, that is not the case which the appellant presents for fearing that his judgment will be a barren one. His case rather is that the company has suffered losses in its hotel business and is generally impecunious. In other words, the danger envisaged is that if the hotel building is sold the proceeds thereof will simply disappear in discharging its liabilities and any surplus will go to Paremba Berhad. In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim. If an injunction were to be granted in this case it would be entirely ineffective to benefit the appellant, because the money would be held for the benefit of creditors generally, or the result would be that a plaintiff could require a defendant to set up a special fund to meet a claim not yet proved, or again the effect might be to give the particular plaintiff preference over the other creditors. We would in this connection also refer to the judgment of this court in *Yeng Hing Enterprise Sdn. Bhd.* v. *Liow Su Fah*[9] (at page 244) and are accordingly unable to take the view that it would be proper in the circumstances to make the order sought by the appellant against the company. We think however that this is a fit case to order an early trial, and we so direct.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Sri Ram & Co.; Ariff & Co.*

KANAGALINGAM v. KANAGARAJAH

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 11 & 23, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 192 of 1981]

Family Law — Girl over eighteen years leaving home and going through form of marriage with a man — No consent of father for marriage — Girl staying with man — Application by father for habeas corpus — Welfare of infant — Wishes of infant — Registration of Marriage Ordinance, 1952, s. 4 — Guardianship of Infants Act, 1961, ss. 2, 3, 5 & 11.

Practice and Procedure — Girl over eighteen years staying with man with whom she went through ceremony of marriage — No consent of father — Application for habeas corpus — No affidavit by person restrained — Application by father but no statement that person restrained unable to make affidavit — Irregularity — Welfare and wishes of infant — Guardianship of Infants Act, 1961, ss. 2, 3, 5 & 11 — R.H.C., 1980 O.54 rr. 1 & 2.

In this case the respondent had applied for an order that a writ of *habeas corpus* be issued directing the appellant to produce the respondent's daughter Rathika before the court to be delivered to him as the lawful father and guardian of the infant. The girl was over 18 years of age and had left her home to go through a form of marriage with the appellant. No consent of the respondent was obtained for the marriage. The application was made under Order 54 of the Rules of the High Court, 1980. The learned Judicial Commissioner who heard the application made an order directing that the girl be put in the care of her aunt, Mrs. Sivarajah, for a year or six months or longer pending further application. The respondent appealed.

Held: (1) the application was rightly made under Order 54 of the Rules of the High Court, which is the provision setting out how the power of the High Court under section 25 of the Courts of Judicature Act, 1964, should be exercised;

(2) in this case no affidavit by the person restrained or statement that the person restrained is unable to make the affidavit was produced; but this was an irregularity which did not nullify the proceedings;

(3) in this case the learned Judicial Commissioner failed to consider the wishes of the infant, which was a factor relevant to the determination of the welfare of the infant and to enable him to decide whether the respondent had made out a case for the issuing of directions in the nature of *habeas corpus*;

(4) in this case the infant was over eighteen years of age, intelligent and capable of making up her own mind as to what she felt best in her own interest;

(5) the infant should therefore be freed from all restraint and be at liberty to choose where she wishes to go.

Cases referred to:-

(1) *Munusamy* v. *Subramaniam & Ors.* [1969] 2 M.L.J. 108.

(1) *Saraswathi Ammal* v. *Dhanakoti Ammal & 3 Ors.* [1925] I.L.R. 48 Mad. 299.

FEDERAL COURT.

N. Ramachandran for the appellant.

K.S. Dass (*S. Balasekaram* with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): Under Originating Motion 23/81 at the High Court Muar Kanagarajah s/o Kandiah the applicant/respondent moved for an order that writ of *habeas corpus ad subjiciendum* be issued directing C. Kanagalingam the respondent/appellant to produce his daughter Rathika before the court to be delivered to him on the grounds that he is the lawful father and guardian